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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 466

JULIAN RALPH ROBINSON,
Petitioner

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Julian Ralph Robinson, respectfully prays that a writ of certiorari be issued out of and under the seal of this Court to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on July 7, 1964, which affirmed the conviction of petitioner by a jury in the United States District Court, Middle District of Alabama, Eastern Division, for an offense laid under the general conspiracy statute charging violations of certain internal revenue laws of the United States relating to non-tax paid whiskey.

The application of your petitioner for a rehearing was denied by the United States Court of Appeals for the Fifth Circuit on August 7, 1964.

OPINIONS BELOW

There was no formal opinion of the District Court.

The opinion of the Court of Appeals (Appendix A, *infra, pp.* A1, A2) has not yet been reported.

JURISDICTION

The judgment of the Court below (Appendix A, *infra,* p. A3) was entered on July 7, 1964. A timely petition for rehearing was denied on August 7, 1964 (Appendix A, *infra,* p. A4). The jurisdiction of this Court is invoked under 28 U.S.Code, Sec. 1254 (1).

QUESTION PRESENTED

Where, assuming as did the Court of Appeals, there was a variance in that the indictment charged one general conspiracy and the proof offered by the United States showed at least three separate conspiracies, does the acquittal of the "connecting link" between the separate conspiracies necessarily result in depriving petitioner of his substantial rights by allowing evidence adduced by the United States concerning the other separate conspiracies with which he was not shown to have been connected to be used against him, even inferentially.

STATUTES INVOLVED

The statutes involved are set forth below (Appendix B, *infra,* pp. A6 *et seq.*).

STATEMENT OF THE CASE

This criminal case originated with the filing of a true bill or indictment against petitioner, Julian Ralph Robinson, and four others, Sam Alta Dryden, Olyn Thomas Godwin, Ray Bueiw Hutcheson, and Thomas Exel Rogers, Jr., on, to-wit, the 8th day of February, 1963, by a grand jury organized in the United States District Court, Middle District of Alabama, Eastern Division (R. 16-20). Other non-indicted named conspirators were Charles Gilmer, Oscar H. Kennington, Sr. and William McElroy (R. 16). There were also unnamed conspirators.

Such indictment charged a single conspiracy, under 18 U.S.Code 371 (Appendix A; *infra*, p. A6), listing eighteen overt acts, among the alleged conspirators to violate certain internal revenue laws of the United States relating to non-tax paid whiskey during the period from, to-wit: June, 1961, and continuing until, to-wit: the 6th day of September, 1962.

The defendants, including petitioner, were thereafter arraigned by the United States District Court sitting at Opelika, Alabama, on, to-wit: the 10th day of April, 1963, and each pleaded "Not Guilty" (R. 25-26).

During the course of the trial, on May 15, 1963, one of the alleged co-conspirators, Ray Bueiw Hutcheson, changed his plea from "Not Guilty" to "Guilty" (R. 551-553).

On the 15th day of May, 1963, the jury found one of the alleged co-conspirators, Sam Alta Dryden, not guilty; and the remaining three, including petitioner, guilty (R. 534-535).

Petitioner was sentenced to three years imprisonment on May 17, 1963 (R. 541). He moved for a new trial (R. 545-546) on the same date, wherein the point was specifically raised there was a fatal variance between the indictment and the proof in that while a single conspiracy

was charged the evidence showed separate and distinct conspiracies. Further, petitioner questioned the sufficiency of the evidence to support the verdict. This motion was overruled (R. 546).

The Court of Appeals affirmed on July 7, 1964 (Appendix A, *infra*, p. A3). A timely petition for rehearing was made on July 28, 1964 (R. 593-605) and denied on August 7, 1964 (Appendix A, *infra*, p. A4).

Petitioner applied for a stay of mandate upon the decision of July 7, 1964, in order to seek a review of the matter by this Court. On August 14, 1964, the Court of Appeals for the Fifth Circuit ordered the mandate stayed pending the disposition of this petition to be filed on or before September 6, 1964 (Appendix A, *infra*, p. A5).

The alleged defendant co-conspirators lived in a relatively small rural area in Alabama and Georgia. Sam Alta Dryden knew them all, and probably nearly everyone else in the area. Ray Hutcheson knew Robinson only by sight for about six years (R. 401 and 402). He had known Godwin for about ten years (R. 401); did not know Rogers at all (R. 402); and was the nephew of Dryden (R. 400).

Dryden in his testimony denied categorically any liquor dealings with anyone during the period laid in the indictment (R. 448 *et seq.*), and particularly petitioner (R. 463-464; 481-482).

Hutcheson denied any liquor dealings with anyone except Gilmer, McElroy, Clark, Godwin and Kennington (R. 401 *et seq.*). He went to prison, after having been sentenced on November 4, 1961, on February 8, 1962.

The A.T.U. men and other officers did not get into the picture until about March, 1962, and at no point from their testimony does it appear there was a continuing conspiracy among the defendants and non-indicted co-conspirators. On the contrary, Satterfield (R. 209 *et seq.*), Graham (R. 223 *et seq.*), and Richardson (R. 239 *et seq.*)

knew only Kennington, Robinson and Rogers in about March, 1962. Berry (R. 343 *et seq.*) knew only Dryden, Kennington and Godwin in about August or September, 1962.

The best synthesis, it would appear, of the evidence on this trial is that it shows a very competitive, albeit illegal industry. Kennington, located in Phenix City, Alabama, near Fort Benning with its thousands of thirsty soldiers, had the retail outlet contacts to dispose of the product. The defendants, acting separately, could supply him in sufficient quantities to satisfy his requirements and those of his clientele. After Kennington approached Hutcheson with Clark in about June or July, 1961 (R. 55) to tap a ready supply, Hutcheson's competitors smelt the scent. Robinson went to Kennington in what may have been July, 1961 (R. 93); but more probably October or November of 1961 (R. 112), since Hutcheson was having trial troubles which terminated in a sentence on November 4, 1961. Godwin got into the act with Hutcheson (R. 61-72), so a *first* conspiracy included Hutcheson, Godwin, Kennington, Clark, Gilmer and McElroy, the latter two being drivers.

With Hutcheson facing court difficulties and the prospects of a prison sentence, Robinson then moved in, independently. Furthermore, Hutcheson's driver, Gilmer, had been arrested (R. 64-65). Robinson approached Kennington from all the evidence (R. 72, 75, 78, 93, 112, 193). Kennington called Robinson twice, both times after Hutcheson had been incarcerated (U.S. Ex. No. 39-R. 275-276—February 25, 1962; U.S. Ex. No. 40-R. 276, 329, 341—March 12, 1962). And it cannot be denied, Kennington had numerous conversations by telephone, subject unknown, with other alleged co-conspirators (R. 251 *et seq.*; R. 300 *et seq.*). Robinson associated Rogers with him to supply Kennington's demands (R. 209 *et seq.*; R. 223 *et*

seq.). They were caught in March, 1962, and that ended that, a *second* conspiracy.

Kennington then apparently smelled immunity for his offenses, or at least some important considerations including money, and by some means in August or September, 1962 (R. 343 *et seq.*), *some months after the Robinson-Rogers debacle in March, 1962,* prevailed upon Godwin to subject himself to arrest by posing as being ready, willing and able to turn the spigot on once again in Phenix City. This was a *third* conspiracy.

The district court charged the jury on a conspiracy to violate 28 U.S.Code, Sec. 5691 (Appendix B, *infra*, p. A14), which refers to a wholesale dealer in liquor; 28 U.S.Code, Sec. 5632 (Appendix B, *infra* p. A13, A14), which refers to removal of spirits; 28 U.S.Code, Sec. 5205 (Appendix B, *infra*, p. A6-A10), which refers to transporting; 28 U.S.Code, Sec. 5604 (Appendix B, *infra*, p. A10-A13), which refers to transporting; and 28 U.S.Code, Sec. 7201 (Appendix B, *infra*, p. A15), which refers to evasion of the liquor tax (R. 507-527).

REASONS FOR GRANTING THE WRIT

In the instant case there is squarely raised the question, and one apparently unresolved by this Court, whether, given the situation in *Kotteokas v. United States*, 328 U.S. 750, but with a "rim", does the acquittal of the "rim" or "connecting link" produce the fatal variance of that doctrine.

Petitioner asserts the instant factual situation resulting in conviction after trial as for a single conspiracy is clearly within the doctrine enunciated in *Kotteakos*, holding that where a general conspiracy is charged, proof of several separate conspiracies constitutes a variance, and where it is not made clear that no prejudice has resulted from the

error, a reversal is in order notwithstanding Rule 52 (a), F. R. Cr. P. (Appendix B, *infra*, p. A15). The Court of Appeals for the Fifth Circuit has followed that doctrine in *Brooks, et al. v. United States,* 164 F. 2d. 142 (CA 5, 1947). *Sigers v. United States,* 321 F. 2d. 843 (CA 5, 1963) is to be distinguished on the facts.

In *Sigers v. United States,* 321 F. 2d. 843 (CA 5, 1963), the court found three conspiratorial wheels, each with its hub and spokes, all enclosed in a larger wheel of conspiracy which was charged in the indictment. The three groups of conspirators were linked together in a common purpose to manufacture, distribute and sell illicit whiskey. There was then present "a rim of the wheel to enclose the spokes". See *Kotteakos v. United States, supra,* p. 755. In the case at bar there is no permissible inference—*especially since Sam Alta Dryden was acquitted*—that any of the "spokes" of the alleged conspiracy were known to the other "spokes". It is submitted that at best there is a mere conjecture. The activities of petitioner Julian Ralph Robinson and Thomas Exel "Junior" Rogers, Jr. occurred after those in the original arrangement had stopped. There is no evidence Robinson knew of this arrangement—mere conjecture—when he approached Kennington; hence his activities were not in furtherance of the conspiracy of June or July, 1961, but entirely separate and independent.

The one link connecting all the activities charged—all the separate conspiracies—would have been, it appears, Sam Alta Dryden. He would have furnished the link found to exist in *Sigers v. United States, supra.* However, since his acquittal removed from the court's consideration any such link, even if Kennington is the "hub" and each conspiracy is a "spoke", there is lacking the "rim".

See further *Canalla v. United States,* 151 F. 2d. 470 (CA 9, 1946) (5 separate conspiracies found); *Daily v. United*

States, 282 F. 2d. 818 (CA 9, 1960) (3 separate conspiracies); *Rocha v. United States*, 288 F. 2d. 545 (CA 9, 1961).

Berger v. United States, 295 U.S. 78, cited by the Court of Appeals, involved several corporations. There were two conspiracies and defendant was connected with both. It does not appear here that petitioner, Robinson, was connected with the activities of Hutcheson or Godwin in supplying Kennington and, at best, he is connected only by conjecture with Dryden. *Kotteakos v. U.S.*, 328 U.S. 750, then must be applicable. It is to be noted five alleged co-conspirators were indicted. Kennington, McElroy and Gilmer were named, but not indicted. Odell Clark was shown to have been in on this as well as two police officers in Phenix City. Our total personnel involved then is at least 9 to 11 and undoubtedly more. All the more reason for *Kotteakos*. Cf. *Grisetti v. U.S.*, 313 F. 2d 187 (CA 5, 1963).

U.S. v. Austin-Bagley Corp., et al., 31 F. 2d. 229 (CCA 2, 1929), cited by the court below, involved one and only one conspiracy. The court stated that the conviction of one conspirator could not be sustained where the rest were acquitted. This doctrine does not seem applicable here.

For similar reasons, *United States v. Fox*, 130 F. 2d. 56 (CA 3, 1942), also cited below, is deemed inapplicable. The *Fox* case would be apropos if in the alleged Hutcheson, Gilmer, Godwin, McElroy, Dryden and Kennington first conspiracy, Dryden and Gilmer, or any other combination of two or three had been found "not guilty". Certainly the rest of the conspirators could logically from a legal viewpoint under the principle of *Fox* and *Austin-Bagley* have been found guilty.

The thrust of this petition is that Sam Alta Dryden is more than a co-conspirator who has been found "not guilty" in a single conspiracy. He is the "connecting link" or

"rim" where proof of at least three separate conspiracies is sought to sustain conviction on an indictment charging one conspiracy.

The analogy is to the key man, *i.e.*, the acquitted man, in a two man conspiracy. The other one must be acquitted also, according to *Austin-Bagley*. Without Dryden, the key man, there is no single conspiracy as laid in the indictment and because of the number of persons (at least 9 to 11) and the number of conspiracies (at least three), this petitioner has been prejudiced in his rights within the doctrine of *Kotteakos*.

The decision of the Court below would appear to conflict in substance with *Kotteokas*. Since there appears to be a growing reliance on the part of the United States to group many defendants together in one indictment of general conspiracy, rather than maintaining separate substantive indictments, the question is one which ought to be resolved by the Supreme Court not only to protect the rights of the individual defendant but also in the interest of the order administration of the federal system of justice.

CONCLUSION

For the reasons stated, it is respectfully submitted this petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A
OPINIONS AND JUDGMENTS BELOW
I
(CAPTION OMITTED)
(JULY 7, 1964)

Before MAGRUDER,* JONES and GEWIN, Circuit Judges.

MAGRUDER, Circuit Judge: Defendant-appellant was charged by the United States with conspiracy to violate the internal revenue laws by the possession, transportation, and sale of non tax-paid liquor in violation of the general conspiracy statute, 18 U. S. C. Sec. 371. Five defendants were named in the indictment, Messrs. Dryden, Godwin, Hutcheson, Robinson, and Rogers; and eighteen overt acts were alleged, some of which took place before appellant Robinson was involved in the case. Appellant makes the somewhat technical argument by way of defense that, whereas the indictment charged a single conspiracy, the proof offered by the government showed three separate conspiracies, and that therefore there was a fatal variance. This would be so only if the variance were said to have affected the "substantial rights" of the defendant Robinson. Rule 52 (a) F. R. Cr. P.

It seems that one Kennington decided to resume the liquor business. He applied naturally enough to Dryden, who had supplied him before. Co-defendant Hutcheson had been Kennington's main supplier until late in 1961, when he went to jail on a previous conviction. Appellant Robinson's first delivery to Kennington is said to have been on or about December 15, 1961. We shall assume in Robinson's favor that the indictment charged only one conspiracy, and that there was a variance in the proof of the allegation contained in the indictment. We must

*Senior Circuit Judge of the First Circuit, sitting by designation.

still inquire whether this alleged variance did indeed result in depriving the appellant of his "substantial rights."

In *Padgett v. United States*, 283 F. 2d 244, 245 (C.A. 5th, 1960), we repeated our ruling in *Jolley v. United States*; 232 F2d 83, 88 (1956), as follows: "If more than one conspiracy was proved, of at least one of which the appellant was guilty, it is clear that there was no variance affecting his substantial rights." We say the same here.

This action is more like *Berger v. United States*, 295 U.S. 78, 55 S. Ct. 629, 79 L. Ed. 1314 (1935), than it resembles *Kotteakos v. United States*, 328 U.S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946).

We do not see how anybody could say that Robinson was not guilty of the offense of conspiracy, treating the conspiracy as that begun by Kennington and including all persons who saw to it that non tax-paid whiskey reach him. Dryden was the "connecting link" necessary in the case. See *Sigers v. United States*, 321 F. 2d 843 (C.A. 5th, 1963). See also *Rocha v. United States*, 288 F. 2d 545 (C.A. 9th, 1961); *United States v. Bletterman*, 279 F. 3d 320 (C.A. 2d, 1960); *Brooks v. United States*, 164 F. 2d 142 (C.A. 5th, 1947).

Before the jury was given the case to decide, the accused Hutcheson withdrew a plea of not guilty and pleaded guilty to the offenses charged. Because of his change of plea, the court naturally convicted him and sentenced him to a penitentiary term, to run concurrently with the sentence which he was then serving. The jury found Godwin, Rogers and Robinson guilty, but found Sam Alta Dryden not guilty. This in itself makes no difference. *United States v. Fox*, 130 F. 2d 56 (C.A. 3rd, 1942); cert. denied 317 U. S. 666, 63 S. Ct. 74, 87 L. Ed. 535 (1942); *United States v. Austin-Bagley Corp.*, 31 F. 2d 229 (C.A. 2d, 1929); cert. denied 279 U.S. 863, 49 S. Ct. 479, 73 L. Ed. 1002 (1929).

A judgment will be entered affirming the judgment of the District Court.

II

(CAPTION OMITTED)

JUDGMENT

Before MAGRUDER,* JONES and GEWIN, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

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*Senior Circuit Judge of the First Circuit, Sitting by designation.

July 7, 1964

Issued as Mandate:

III

(CAPTION OMITTED)

(AUGUST 7, 1964)

ON PETITION FOR REHEARING

Before MAGRUDER,* JONES and GEWIN, Circuit Judges.

PER CURIAM

IT IS ORDERED That the appellant's petition for rehearing in the above entitled cause be, and it is hereby DENIED.

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*Senior Circuit Judge of the First Circuit, sitting by designation.

IV

(CAPTION OMITTED)

ON CONSIDERATION OF THE APPLICATION of the appellant in the above numbered and entitled cause for a stay of the mandate of this Court therein, to enable appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this Court in said cause be and the same is stayed for a period of thirty days from August 7, 1964; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from August 7, 1964 there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from August 7, 1964 unless the above-mentioned certificate shall be filed with the Clerk of this Court within that time.

/s/ CALVERT MAGRUDER

United States Circuit Judge

Dated: (Original Filed August 15, 1964)

APPENDIX B

STATUTES AND RULE INVOLVED

I

TITLE 18

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

II

TITLE 26

§ 5205. Stamps

(a) Stamps or containers of distilled spirits.—

(1) Containers of distilled spirits bottled in bond.—Every container of distilled spirits bottled in bond under section 5233 when filled shall be stamped by a stamp evidencing the bottling of such spirits in bond under the provisions of this paragraph and section 5233.

(2) Containers of other distilled spirits.—No person shall transport, possess, buy, sell, or transfer any distilled

spirits, unless the immediate container thereof is stamped by a stamp evidencing the determination of the tax or indicating compliance with the provisions of this chapter. The provisions of this paragraph shall not apply to—

(A) distilled spirits, lawfully withdrawn from bond, placed in containers for immediate consumption on the premises or for preparation for such consumption;

(B) distilled spirits in bond or in customs custody;

(C) distilled spirits, lawfully withdrawn from bond, in immediate containers stamped under other provisions of internal revenue or customs law or regulations issued pursuant thereto;

(D) distilled spirits, lawfully withdrawn from bond, in actual process or rectification, blending, or bottling, or in actual use in processes of manufacture;

(E) distilled spirits on which no internal revenue tax is required to be paid;

(F) distilled spirits lawfully withdrawn from bond and not intended for sale or for use in the manufacture or production of any article intended for sale; or

(G) any regularly established common carrier receiving, transporting, delivering, or holding for transportation or delivery distilled spirits in the ordinary course of its business as a common carrier.

(3) Stamp regulations.—The Secretary or his delegate shall prescribe regulations with respect to the supplying or procuring of stamps required under this subsection or section 5235, the time and manner of applying for, issuing, affixing, and destroying such stamps, the form of such stamps and the information to be shown thereon, applications for the stamps, proof that applicants are entitled to such stamps, and the method of accounting for such stamps, and such other regulations as he may deem necessary for the enforcement of this subsection. In the

case of a container of a capacity of 5 wine gallons or less, the stamp shall be affixed in such a manner as to be broken when the container is opened, unless the container is one that cannot again be used after opening.

(b) Stamps for containers of distilled spirits withdrawn from bonded premises on determination of tax.—Containers of all distilled spirits withdrawn from bonded premises on determination of tax under section 5006 (a) shall be stamped by a stamp under such regulations as the Secretary or his delegate shall prescribe. This subsection shall not be construed to require stamps on cases of bottled distilled spirits filled and stamped on bonded premises.

(c) Stamps for containers of distilled spirits withdrawn for exportation.—

(1) Exportation without payment of tax.—Every container of distilled spirits withdrawn for exportation under 5214 (a) (4) shall be stamped by a stamp under such regulations as the Secretary or his delegate shall prescribe. This paragraph shall not be construed to require stamps on cases of bottled distilled spirits filled and stamped on bonded premises.

(2) Exportation with benefit of drawback.—The Secretary or his delegate may require any container of distilled spirits bottled or packaged especially for export with benefit of drawback to be stamped by a stamp under such regulations as he may prescribe.

(d) Stamps for containers of 5 wine gallons or more of distilled spirits filled on bottling premises.—All containers of distilled spirits containing 5 wine gallons or more, which are filled on bottling premises of a distilled spirits plant for removal therefrom, shall be stamped by a stamp under such regulations as the Secretary or his delegate shall prescribe.

(e) Issue for restamping.—The Secretary or his delegate, under regulations prescribed by him, may authorize restamping of containers of distilled spirits which have been duly stamped but from which the stamps have been lost or destroyed by unavoidable accident.

(f) Accountability.—All stamps relating to distilled spirits shall be used and accounted for under such regulations as the Secretary or his delegate may prescribe.

(g) Effacement of stamps, marks, and brands on emptied containers.—Every person who empties, or causes to be emptied, any immediate container of distilled spirits bearing any stamp, mark, or brand required by law or regulations prescribed pursuant thereto (other than containers stamped under subsection (a) or section 5235) shall at the time of emptying such container efface and obliterate such stamp, mark, or brand, except that the Secretary or his delegate may, by regulations, waive any requirement of this subsection as to the effacement or obliteration of marks or brands (or portions thereof) where he determines that no jeopardy to the revenue will be involved.

(h) Form of stamp.—Any stamp required by or prescribed pursuant to the provisions of this section or section 5235 may consist of such coupon, serially-numbered ticket, imprint, design, or other form of stamp as the Secretary or his delegate shall by regulations prescribe.

(i) Cross references.—

(1) For general provisions relating to stamps, see chapter 69.

(2) For provisions relating to the stamping, marking, and branding of containers of distilled spirits by proprietors, see section 5204 (c).

(3) For provisions relating to the stamping of bottled alcohol, see section 5235.

(4) For authority of the Secretary or his delegate to prescribe regulations regarding stamps for distilled spirits withdrawn to manufacturing bonded warehouses, see section 5522 (a).

(5) For penalties and forfeitures relating to stamps, marks, and brands, see sections 5604, 5613, 7208, and 7209.

Added Pub.L. 85-859, Title II, § 201, Sept. 2, 1958, 72 Stat. 1358.

III

TITLE 26

§ 5604. Penalties relating to stamps, marks, brands, and containers

(a) General.—Any person who shall—

(1) transport, possess, buy, sell, or transfer any distilled spirits, required to be stamped under the provisions of section 5205 (a) (2), unless the immediate container thereof has affixed thereto a stamp as required by such section; or

(2) with intent to defraud the United States, empty a container stamped under the provisions of section 5205 (a) (1) or (2) or section 5235 without destroying the stamp thereon as required by section 5205 (a) (3) or regulations prescribed pursuant thereto; or

(3) empty, or cause to be emptied, any distilled spirits from any immediate container (other than a container stamped under section 5205 (a) or section 5235) bearing any stamp, mark, or brand required by law without effacing and obliterating such stamp, mark, or brand as required by section 5205 (g); or

(4) with intent to defraud the United States, falsely make, forge, alter, or counterfeit any stamp required under section 5205 or section 5235; or

(5) use, sell, or have in his possession any forged or fraudulently altered stamp, or counterfeit of any stamp, required under section 5205 or section 5235, or any plate or die used or which may be used in the manufacture thereof; or

(6) with intent to defraud the United States, use, reuse, sell, or have in his possession any stamp required to be destroyed by section 5205 (a) (3) or regulations prescribed pursuant thereto; or

(7) remove any stamp required by law or regulations from any cask or package containing, or which had contained, distilled spirits, without defacing or destroying such stamp at the time of such removal; or

(8) have in his possession any undestroyed or undefaced stamp removed from any cask or package containing, or which had contained, distilled spirits; or

(9) have in his possession any cancelled stamp or any stamp which has been used, or which purports to have been used, upon any cask or package of distilled spirits; or

(10) make, use, sell, or have in his possession any paper in imitation of the paper used in the manufacture of any stamp required under section 5205 or section 5235; or

(11) reuse any stamp required under section 5205 (a) or section 5235, after the same shall have once been affixed to a container as provided in such sections or regulations issued pursuant thereto; or

(12) place any distilled spirits in any bottle, or reuse any bottle for the purpose of containing distilled spirits, which has once been filled and stamped under the provisions of this chapter, without removing and destroying the stamp so previously affixed to such bottle; or

(13) affix any stamp issued pursuant to section 5205 (a) (2) and (3) to any container containing distilled spirits on which any tax due is unpaid or undetermined; or

(14) make any false statement in any application for stamps under section 5205; or

(15) possess any stamp prescribed under section 5205 or section 5235 obtained by him otherwise than as provided by such sections or regulations issued pursuant thereto; or

(16) willfully and unlawfully remove, change, or deface any stamp, mark, brand, label, or seal affixed to any case of distilled spirits, or to any bottle contained therein; or

(17) with intent to defraud the United States, purchase, sell, receive with intent to transport, or transport any empty cask or package having thereon any stamp, mark, or brand required by law to be affixed to any cask or package containing distilled spirits; or

(18) change or alter any stamp, mark, or brand on any cask or package containing distilled spirits, or put into any cask or package spirits of greater strength than is indicated by the inspection-mark thereon, or fraudulently use any cask or package having any inspection-mark or stamp thereon, for the purpose of selling other spirits, or spirits of quantity or quality different from the spirits previously inspected therein; or

(19) affix, or cause to be affixed, to or on any cask or package containing, or intended to contain, distilled spirits, any imitation stamp or other engraved, printed, stamped, or photographed label, device, or token, whether the same be designed as a trade mark, caution notice, caution, or otherwise, and which shall be in the similitude or likeness of, or shall have the resemblance or general appearance of, any internal revenue stamp required by law to be affixed to or upon any cask or package containing distilled spirits;

shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, for each such offense.

(b) Officers authorized to enforce this section.—Any officer authorized to enforce any provision of law relating to internal revenue stamps is authorized to enforce this section. Added Pub.L. 85-859, Title II, § 201, Sept. 2, 1958, 72 Stat. 1401.

IV

TITLE 26

§ 5632. Penalty and forfeiture for unlawful removal or concealment of spirits

All distilled spirits found elsewhere than in a distillery or internal revenue bonded warehouse, not having been removed therefrom according to law, shall be forfeited to the United States. Whenever any person removes, or aids or abets in the removal of, any distilled spirits on which the tax has not been determined or paid, to a place other than the internal revenue bonded warehouse provided by law, or conceals or aids in the concealment of any spirits so removed, or removes, or aids or abets in the removal of, any distilled spirits from any such warehouse authorized

by law, in any manner other than as provided by law, or conceals or aids in the concealment of any spirits so removed, he shall be liable to a penalty of double the tax imposed on such distilled spirits so removed or concealed, and shall be fined not more than $5,000, and imprisoned not more than 3 years. Aug. 16, 1954, 9:45 a.m., E.D.T., c. 736, 68A Stat. 690.

V

TITLE 26

§ 5691. Penalties for nonpayment of special taxes relating to liquors

(a) General.—Any person who shall carry on the business of a brewer, rectifier, wholesale dealer in liquors, retail dealer in liquors, wholesale dealer in beer, retail dealer in beer, limited retail dealer, or manufacturer of stills, and willfully fail to pay the special tax as required by law, shall be fined not more than $5,000, or imprisoned not more than 2 years, or both, for each such offense.

(b) Presumption in case of the sale of 20 wine gallons or more.—For the purpose of this chapter, the sale, or offer for sale, of distilled spirits, wines, or beer, in quantities of 20 wine gallons or more to the same person at the same time, shall be presumptive evidence that the person making such sale, or offer for sale, is engaged in or carrying on the business of a wholesale dealer in liquors or a wholesale dealer in beer, as the case may be. Such presumption may be overcome by evidence satisfactorily showing that such sale, or offer for sale, was made to a person other than a dealer, as defined in section 5112(a). Added Pub.L. 85-859, Title II, § 201, Sept. 2, 1958, 72 Stat. 1413.

VI

TITLE 26

§ 7201. Attempt to evade or defeat tax

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution. Aug. 16, 1954, 9:45 a.m., E.D.T., c. 736, 68A Stat. 851.

VII

Rule 52, Federal Rules of Criminal Procedure

(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 466

JULIAN RALPH ROBINSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1–2) is reported at 333 F. 2d 950.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 1964. A petition for rehearing was denied on August 7, 1964. The petition for a writ of certiorari was filed on September 8, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's conviction for conspiracy to violate the liquor laws in the sale and distribution of non-taxpaid whiskey to one Kennington should be

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reversed because of the acquittal of the principal supplier, who had operated through a co-defendant before petitioner undertook to supply Kennington.

STATEMENT

Petitioner and four co-defendants (Dryden, Hutcheson, Godwin and Rogers) were indicted in the United States District Court for the Middle District of Alabama for conspiracy to violate the internal revenue laws relating to the sale and distribution of non-taxpaid liquor from June 1961 to September 1962 (R. 16–20). During the trial Hutcheson pleaded guilty (R. 551–553). The jury acquitted Dryden, but convicted the other defendants (R. 534–535). Petitioner was sentenced to imprisonment for three years (R. 541). On appeal by petitioner alone, his conviction was affirmed.

The principal government witness was one Kennington who bought non-taxpaid liquor for resale in Phenix City, Alabama. His principal supplier was the acquitted defendant Dryden, whose "front man" at the beginning of the conspiracy was the defendant Hutcheson.[1] Before Hutcheson pleaded guilty, Kennington testified to a number of transactions involving purchases from Dryden and Hutcheson, with deliveries made by defendant Godwin (R. 64–66). Late in 1961, Hutcheson "went off" as Kennington's supplier and was replaced by petitioner whose first delivery was of 250 to 300 gallons. Shortly thereafter, when Kennington approached Dryden directly

[1] Dryden told an undercover A.T.U. agent that he did not have to get out in front in the liquor business because he had other businesses (R. 566).

about buying some whiskey, Dryden asked, "What, ain't Ralph [petitioner] taking care of you?" (R. 74–76, 78). Petitioner and defendant Rogers, another driver, delivered 738 gallons of whiskey to Kennington's place of business in Phenix City in March 1962 (R. 80, 84–85). Kennington was arrested and thereafter worked with undercover agents assigned to this case. A few days after Kennington's arrest, a delivery of 744 gallons of whiskey was made to him by Rogers, followed by petitioner in a passenger car (R. 80–85, 210–212). Petitioner and Rogers were arrested on March 25, 1962, when State officers came upon their stalled car loaded in back with 254 gallons. The men admitted that the liquor was theirs and asked the officers to give them a "break" (R. 241–247).

In August 1962, Kennington, accompanied by an undercover agent, talked with Dryden in Tallapoosa, Georgia. Kennington said that he was going to start back in the liquor business and needed some whiskey. Dryden told him to go back to Phenix City and that petitioner would communicate with him in a day or two. Kennington objected to this arrangement, and Dryden told him to go back and Godwin would get in touch with him. On September 5, 1962, Godwin reported to Kennington that the car delivering the whiskey was stuck in the mud. Later they unloaded 150 gallons in the woods and Kennington paid Godwin $562.50 (R. 343–348).

Numerous telephone calls were made during the period from August 1961 to May 1962 between numbers listed in the names of Kennington, Dryden, Hutcheson

and petitioner's wife (R. 251–264, 308–312, 320–332, 341–342).

Dryden testified in his own behalf, admitting communications with Hutcheson and Kennington, but denying that he participated in any liquor transactions (R. 446–488).

ARGUMENT

Petitioner argues that the acquittal of Dryden removed the "connecting link" in the conspiracy charged by the government and that therefore petitioner could not properly have been convicted of the conspiracy charged in the indictment. The court of appeals, assuming *arguendo* that the proof did show a variance, found that the alleged variance did not affect petitioner's substantial rights, and that the case was therefore more like *Berger* v. *United States*, 295 U.S. 78, than *Kotteakos* v. *United States*, 328 U.S. 750. This ruling was amply justified on the facts of this case.

Petitioner was shown to have entered into a conspiracy with Kennington to supply illegal liquor to him with the assistance of Rogers. Thus there was ample proof, as pointed out in Judge Magruder's opinion, of petitioner's participation in a conspiracy with others to violate the liquor laws. We may assume that on the facts, as reflected in the jury's verdict, (*i.e.* with Dryden out of the case) the earlier conspiracy among Kennington, Hutcheson, and Godwin was a separate conspiracy to supply Kennington. The *Kotteakos* decision, however, made it clear that the mere fact of variance does not *ipso facto* require a reversal. In this case the evidence of petitioner's

direct participation in the conspiracy charged to him was so clear and the evidence as to his participation so separate and distinct from that as to Hutcheson, that there is no reason to reverse petitioner's conviction. Moreover, at least some of the evidence relating to Hutcheson would properly have come into the case if the conspiracy involving petitioner had been tried alone since Kennington's dealings with Hutcheson would be background evidence to explain how and why petitioner came to deal with Kennington. There is thus no occasion for this Court to review the conclusion of the court of appeals, based on an evaluation of the particular facts of this case, that the variance suggested by the jury's verdict did not affect petitioner's substantial rights.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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